IN THE

SUPREME COURT OF THE

UNITED STATES

_____ Term, 1974

NO. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Missouri Court of Appeals, St. Louis District, affirming the denial by the Circuit Court of the City of St. Louis, Missouri, of the petitioner's motion for post-conviction relief under Missouri Supreme Court Rule 27.26 is reported as follows: James Edward Drope v. State of Missouri, 498 S.W.2d 838 (Mo.Ct.App. at St.L. 1973).

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) (1970).

QUESTIONS PRESENTED

1. Is the finding that the trial court had not had "reasonable cause to believe" that the petitioner was suffering from "a mental disease or defect excluding sickness to proceed" at the time of petitioner's original trial clearly erroneous?

2. If it is determined that that finding is not clearly erroneous, the petitioner's contention that his constitutional rights were violated when the trial was continued in his absence presents nothing for this Court to review.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

The petitioner was convicted by a jury in the Circuit Court of the City of St. Louis, Missouri, of the offense of rape on January 17, 1969. Shortly thereafter, as the petitioner was shown to be a second offender, the trial court assessed his punishment at life imprisonment. From that conviction, the petitioner appealed to the Supreme Court of Missouri and the opinion of that court on the appeal is cited as State v. Drope, 462 S.W.2d 677 (Mo. 1971). During the course of his trial, the petitioner shot himself with a .22 caliber firearm and was absent during the last day of trial. The issue of whether the petitioner's absence was "voluntary" so as to justify the trial court in proceeding with trial was decided adversely to the petitioner on direct appeal. It is important to note, however, that the petitioner did not claim on direct appeal that the trial court should have had a bona fide doubt as to the petitioner's mental capacity to proceed with trial at any point during the proceedings. The question of the voluntariness of petitioner's absence during the final day of trial was the subject of an expensive hearing held on the petitioner's motion for new trial and the affirmation by the Supreme Court of Missouri that the petitioner's absence was in fact voluntary is not before this Court for review.

The questions before this Court here arise from the denial of the petitioner's motion for post-conviction relief under Missouri Supreme Court Rule 27.26, V.A.M.R. A copy of that rule is attached hereto as Exhibit 1. In essence, the rule provides for relief on constitutional grounds in the state court system similar to the relief obtainable by way of federal habeas corpus. When a motion is filed in the sentencing court by one in the petitioner's position, a hearing is to be held to determine issues of fact and questions of law raised by the allegations contained in the motion. The movant under the Rule has the burden

of proving his allegations by the preponderance of the evidence at the hearing. The trial court presides at the hearing as the fact-finder and thereafter issues findings of fact and conclusions of law on all questions raised in the motion. Either the movant under the Rule or the State of Missouri is then entitled to appeal from the judgment of the trial court. Review on appeal, however, is limited to determining whether the trial court committed clear error in rendering its findings and conclusions.

It was within the framework of that Rule that the petitioner moved for post-conviction relief in the Circuit Court of the City of St. Louis, Missouri. The major question which was litigated at the petitioner's hearing under Rule 27.26 was whether the trial court should have had "reasonable cause to believe" under Section 552.020, RSMo 1969, that the petitioner was suffering from "a mental disease or defect excluding fitness to proceed." Under that statute, if the trial court had such cause, it would be required to order a psychiatric examination of the petitioner on its own motion. Thus, the principal question at the hearing was whether the trial court should have had a bona fide doubt as to the petitioner's competency to stand trial which would require him to sua sponte order a psychiatric examination of the petitioner. It is important to note that the question of whether the petitioner was suffering from a mental disease or defect so as to lack the capacity to understand the proceedings against him or to assist in his own defense was not litigated at the hearing, although such an allegation is cognizable at a hearing on a motion under Rule 27.26.

On this principal issue, the testimony of only two of the witnesses seems relevant: Dr. Joseph S. Shuman and Dr. John Tek Lum, both of whom were experts in psychiatry. Dr. Shuman had examined the petitioner about four months prior to the original trial, on February 20, 1969, for about an hour and a half and had made a written report of that examination which the lower court attached as an appendix to the opinion, 498 S.W.2d at 844-847. Dr. Shuman stated that if a person made a "suicide" attempt there would be reasonable cause to believe that that person might not be mentally competent to stand trial. However, the doctor indicated it was certainly a possibility that a person in the petitioner's position at the time of his trial could deliberately, willfully and voluntarily shoot himself to get his trial continued. At

the examination on February 20, 1969, the doctor said the petitioner was not very responsive and was very nervous but fairly cooperative. The petitioner was able to answer judgment questions without trouble and was free from psychosis. The doctor did not state in his report of the examination that the petitioner was unable to understand a court proceeding or assist and aid his counsel. Under the facts of the petitioner's case, as hypothesized, Dr. Shuman said that he would have had reasonable cause for requiring a psychiatric examination. However, he indicated that a man in the petitioner's position who had shot himself and told a police officer that he had done so to avoid going to trial very likely knew what he was doing. People who really intend to commit suicide by shooting themselves would choose a vital spot in which to inflict the mortal wound.

The petitioner's situation was also hypothesized to Dr. Lum and he stated that in that situation he would have had reasonable cause for requiring a psychiatric examination to be made. The doctor stated that in his opinion the petitioner had made a suicide attempt by shooting himself. Of the people who make such attempts, 85% of them have, for example, a chronic depressive illness or suffer from alcoholism. The remaining 15% suffer character disorders, schizophrenia or organic brain problems. If a person deliberately shot himself not to commit suicide but to achieve any other result, such as to stop a trial, the doctor would say that that person had a psychiatric problem.

The trial court at the 27.26 hearing also took judicial notice of the record of the petitioner's original trial. The report of the examination made by Dr. Shuman was attached to a "Motion for Continuance" which was filed by petitioner's counsel on May 27, 1969. That motion appears at pages 3-4 of the petitioner's Exhibit E. Also, the petitioner's wife, the victim of the rape, had made a statement which was introduced at the trial and which is set forth at page 4 of the petition to the effect that she believed the petitioner was suffering from a "mental condition." Further, the crime charged against the petitioner was that of raping, with others, his own wife which clearly reveals aberrant sexual behavior. The petitioner's wife also testified at trial that he had had blackouts and would on occasion roll downstairs when he did not get his own way. She indicated, however, that she had formed her opinion after visiting Dr. Shuman. Also, the

petitioner's trial counsel had made this objection:

> "I am objecting to going to trial with this defendant also for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial."

There was also the incident of the petitioner shooting himself between the second and final day of trial. At the hearing on the motion for new trial, the petitioner claimed he did not remember anything about shooting himself. However, there was evidence that he told the police officer shortly after the event while in hospital that he had done so to avoid going to trial.

ARGUMENT

The most important fact in this case is that at sometime between the second and third day of trial, while he was released on bond, the petitioner shot himself in the abdomen with a small caliber weapon, thereby injuring himself and causing his hospitalization so that he could not attend the last day of trial. The petitioner has fervently sought to characterize his self-inflicted wound as a "suicide" attempt. There is substantial, although circumstantial, evidence which indicates that the petitioner did not actually intend to take his own life and staged the act so as to be confident that he would not in fact die from the injuries. The wound was inflicted with a small caliber weapon to a non-vital part of the body at a time when help was readily available. At hospital, while being interviewed by a police officer, the petitioner stated that his intention was to avoid going to trial. Under these circumstances, the respondent respectfully asserts that it can hardly be said that the petitioner proved that he tried to kill himself. However, the lower court assumed for purposes of argument that the actions of the petitioner amounted to a "suicide" attempt. The respondent will make the same assumption here.

I

THE DECISION BELOW IS CLEARLY CORRECT

Should the trial court have had a bona fide doubt as to the petitioner's fitness to stand trial so as to sua sponte require him to, under Missouri law, order that the petitioner undergo a psychiatric examination so that the question of fitness could be determined by expert opinion?

The respondent recognizes that the leading authority in this area is this Court's decision in Pate v. Robinson, 383 U.S. 375 (1966). That was also recognized by the lower court. The difficulty arises in applying the Pate doctrine to the facts of this case. It is the respondent's position that the lower court's application of the Pate doctrine to the facts of this case is clearly correct. As previously indicated, under Chapter 552, RSMo 1969, whenever a trial judge in Missouri has "reasonable cause to believe" that an accused on trial is suffering from a "mental disease or defect excluding fitness to proceeed," he must on his own motion or that of either party cause the accused to be psychiatrically examined. However a hearing is held on the question only if the expert opinion as to whether the accused is fit to proceed is contested. The respondent has attached a true copy of Section 552.020, RSMo 1969, as Exhibit 2, which outlines the procedure to be followed under those circumstances. The procedure is somewhat different from that employed by the State of Illinois which was construed in the Pate case. However, the respondent asserts that the Missouri procedure comports with the due process aspects of that decision.

The term "mental disease or defect" is one of art and defined by statute, Section 552.010, RSMo 1969, a true copy of which appears in Exhibit 2. It is possibly worthy of note that the term excludes abnormality manifested only by "repeated criminal or otherwise antisocial conduct" or by sexual perversion.

As the lower court noted, the test for competency to stand trial was stated by this Court in Dusky v. United States, 362 U.S. 402 (1960). If an accused "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and if he "has a rational as well as a factual understanding of the proceedings against him," he is competent to stand trial. To a certain extent, that test is codified in Missouri:

> "No person who as a result of mental disease or defect lacks capacity to understand a proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Section 552.020(1).

However, as the statute uses the term "mental disease or defect" it is somewhat more restrictive than the Dusky formulation. To some extent that is cured by rulings of the courts of this state which tend to shy away from the term "mental disease or defect." See, e.g. Pulliam v. State, 480 S.W.2d 896 (Mo. 1972). However, the distinction is of more than passing importance as the lower court relied on, at the urging of the respondent, the definition of "mental disease or defect" to some extent in disposing of the allegation that the petitioner's sexual perversion bore on the question under discussion. Clearly, however, unless a person's sexual perversion has reached the point of total obsession, he is not thereby deprived of a rational degree of understanding in the asexual atmosphere of a criminal courtroom. To the extent that the petitioner suggests he was unable to understand the proceedings or assist in his own defense because of his sexual perversion, the respondent asserts there is no evidence whatsoever to support that allegation.

Other than the attempted "suicide" the major incidents which allegedly support the petitioner's position on the question concern (1) the activities of his trial counsel and (2) the report of the examination by Dr. Shuman.

Unfortunately, the petitioner's trial counsel, Lester Watson, did not testify at the hearing held under Rule 27.26 and therefore there is nothing in the record to indicate that he had any basis for believing that the petitioner was unfit to proceed. Certainly, no inference whatsoever can be attached to the fact that Mr. Watson had Dr. Shuman examine the petitioner. Such a precautionary examination is taken as a matter of course by many defense counsel. Furthermore, the motion filed by Mr. Watson to which he attached a copy of the examination made by Dr. Shuman was entitled "Motion for Continuance." That clearly suggests that the purpose of the motion was to obtain a continuance and the suggestion is strengthened by the fact that the motion was not filed until some three months after Dr. Shuman examined the petitioner. Apparently, it was Mr. Watson's intention at that time to invoke the provisions of Section 552.030, RSMo 1969, so as to rely on the defense of not guilty by reason of mental disease or defect. A copy of that statute is included in Exhibit 2. Mr. Watson was in fact told that "if he seriously contended that his client was mentally incompetent he should file a proper motion." Page 19 of Exhibit E. Although it is

motion filed by Mr. Watson, it is clear that Mr. Watson did not attempt to correct his motion. However, he did orally request that the petitioner have a further psychiatric examination on the day trial began, June 23, 1969, and stated that the petitioner was not "a person of sound mind." However, at no time did Mr. Watson contend that the petitioner did not have the mental capacity to stand trial - neither during the proceedings leading up to trial, at the time he was forced to go to trial, at the time the petitioner shot himself, at the hearing on the motion for new trial, nor on direct appeal. Under all of these circumstances, it can hardly be said that Mr. Watson had a sincere belief that the petitioner was unfit to proceed. In determining a criminal defendant's fitness to proceed, the trial courts of Missouri, and probably those of many other states, must rely on the sincere opinions of trial counsel and if counsel seriously doubts his client's fitness and fails to express it to the trial court, he renders ineffective assistance. Miller v. State, 498 S.W.2d 79 (Mo.Ct.App. at K.C. 1973). If Mr. Watson had expressed serious and sincere doubts as to the petitioner's capability of standing trial and the trial court chose to ignore those doubts, the concept of the Pate case would very likely have been breached. However, in this case, in light of the fact that Mr. Watson did not even suggest that the petitioner was unable to assist in his own defense or understand the proceedings against him, the trial court was certainly justified in believing that Mr. Watson's exhortations concerning the petitioner's mental condition were designed solely to gain a continuance and were not sincere. And, if Mr. Watson had been sincere, he certainly would not have dropped the matter as he did.

As previously indicated, Dr. Shuman's report was attached by the lower court to its opinion as an appendix, 498 S.W.2d 844-847. That report was analyzed in some detail by the lower court. Id. at 842. The report indicates that the petitioner indeed has a mental problem and is in need of psychiatric help. However, there is nothing in the report to indicate that the petitioner would be unable to understand the proceedings against him or assist in his own defense. To the contrary, Dr. Shuman found the petitioner to be "well oriented in all

coherent," able to answer judgment questions without difficulty, and not beset by delusions, obsessions, etc. The doctor's conclusions as contained in the report describe to some extent the petitioner's mental problem. However, none of these conclusions indicate anything which would interfere with the capability of the petitioner to understand legal proceedings or to help his counsel. In short, there is nothing in the report to indicate to the trial court that the petitioner was unfit to proceed.

Finally, the petitioner's act of shooting himself must be considered. However, in light of the way Mr. Watson handled the situation and in view of Dr. Shuman's report, the attempted "suicide" must stand on its own. It is the respondent's view that for this Court to hold that the lower court clearly erred in resolving the question under discussion, the Court must virtually hold that the act of attempted suicide in and of itself as a matter of law should raise a bona fide doubt in the trial judge's mind and provide him with "reasonable cause to believe" that the person making such an attempt is unfit to proceed so as to require the judge on his own motion or sua sponte to, under Missouri law, order a psychiatric examination be made. However, in this case, the trial court had before it evidence to the effect that the petitioner had attempted "suicide" in order to avoid trial. That the petitioner wanted to avoid trial is understandable in light of the fact that he had just heard his wife testify to the atrocities to which she was forced to submit at the petitioner's instigation. The respondent asserts that it is reasonable for one to attribute to a person who attempts suicide a state of mind overwhelmed by despondency, depression and despair. The act of attempted suicide itself does not evidence the lack of a person's ability to consult with counsel with a reasonable degree of rational understanding or the lack of a factual understanding of trial proceedings. As did the lower court, the respondent accepts "as true the psychiatric testimony on the 27.26 hearing, that to these psychiatrists, an attempt at suicide would raise a reasonable doubt as to a man's competency to proceed with the trial." Those men were testifying as experts. The judge who presided over the petitioner's trial and at the 27.26 hearing professed no expertise in the area of psychiatry. To resolve the question at hand, he must be viewed as a reasonable judge possessing legal training and exper-

an act of attempted suicide with a despondent mental state but [illegible] with an inability to reason with counsel or understand trial proceedings.

Pate v. Robinson is distinguishable. After reviewing the pertinent evidence in that case, this Court stated: "We believe that the evidence introduced on Robinson's behalf entitled to him a hearing on this issue [competency to stand trial]." 383 U.S. at 385. In this case, there was no evidence introduced at the petitioner's trial on the issue of his capacity to stand trial. It is true that his wife testified that he had had blackouts and had rolled downstairs and that she thought he had mental problems. As noted by the lower court, however, her testimony related to the petitioner's sexual perversion and not his competency. 498 S.W.2d at 842. As previously discussed, there is no evidence to warrant a finding that the petitioner's sexual perversion affected his competency. It would also seem that the petitioner's wife reached the opinion that her husband needed psychiatric help after discussing the situation with Dr. Shuman. As previously indicated, there is nothing in Dr. Shuman's report to suggest that the petitioner's ability to confer with counsel and understand factual proceedings was affected by his mental problems. Under these circumstances, it can hardly be said that her testimony provides the trial court with grounds for sua sponte ordering the petitioner to undergo a psychiatric examination.

The respondent stresses that the issue before the lower court was not whether the petitioner in fact was incompetent to stand trial. The issue was whether the trial court should have had a bona fide doubt as to the petitioner's competency at any time during the trial proceedings. As reviewed above, the petitioner failed to prove that the trial court should have had such a doubt by the preponderance of the evidence and the holding of the lower court to that effect is not clearly erroneous.

The second question presented to this Court is in effect disposed of by the result reached as to the first question.

On the petitioner's direct appeal in State v. Drope, 462 S.W.2d 677 (Mo. 1971), the Missouri Supreme Court considered the question of whether the petitioner's constitutional rights were violated on the basis that he "voluntarily and intentionally inflicted a wound on himself with the intent to make his presence at the trial impossible."

Id. at 681. It was held that under the evidence before the trial court, there was no constitutional violation.

After his conviction was affirmed, the petitioner petitioned for a writ of federal habeas corpus raising the question of whether his constitutional rights were infringed when the trial proceeded without him after he had shot himself. Drope v. Swenson, No. 71 C 134 (2) (E.D.Mo. April 1, 1971). In overruling the petition without prejudice, District Judge John K. Ragan stated:

> "If petitioner's real contention is that his action in shooting himself and his consequent absence from the remainder of his trial was the result of mental incompetency and this contention is related to his ability to stand trial, it is evident that such an issue was not presented to the Missouri Supreme Court in the direct appeal, so that available post-conviction remedies have not been exhausted."

On the appeal from the denial of his 27.26 motion, the petitioner did not contend that he was in fact suffering from "a mental disease or defect excluding fitness to proceed" so that it was error of constitutional dimension to proceed without his presence at trial. As noted by the lower court, under the evidence presented at the 27.26 hearing, such a contention could not be sustained.

What the petitioner in fact contended was that constitutional error occurred when the trial proceeded without him because the trial court should have ordered a psychiatric examination and conducted other proceedings pursuant to Section 552.020, RSMo 1969. In arguing the first question presented, the respondent has asserted that it was not clearly erroneous to find that the petitioner had not proved by the preponderance of the evidence that the trial court should have had a bona fide doubt as to his mental competency at any point in the proceedings. That argument is reasserted here in toto. As that finding was not clearly erroneous, and since the Missouri Supreme Court ruled on the other aspects of the contention made by the petitioner in his second question, and as the ruling by the Missouri Supreme Court is not before this

court for review; there is nothing for this Court to review under the second question.

In passing, it should be noted that the lower court ruled that it would not be an abuse of the trial court's discretion to withhold ordering a mental examination under Chapter 552 until the end of trial if the trial court developed reasonable cause to believe the petitioner was suffering from a mental disease or defect excluding fitness to proceed. That ruling was fashioned to accommodate the particular procedure required by Chapter 552. The respondent asserts that granting the trial court such discretion in no way violates federally protected rights.

II

NO COMPELLING REASON IS PRESENTED FOR GRANTING THE PETITION

The respondent admits that some of the factual aspects of this case are unique. However, the only real question presented to this Court is exceedingly narrow: whether as a matter of law an attempt at suicide occurring during trial should raise a bona fide doubt as to fitness to proceed? The petitioner notes that he has found no other cases where such an attempt occurred. Obviously, resolution of that question by this Court is not required to provide guidance for the lower state and federal courts. This Court's decision in Pate v. Robinson adequately provides such guidance. Both the Circuit Court of the City of St. Louis, Missouri, and the Missouri Court of Appeals, St. Louis District, recognized the applicability of the Pate doctrine to the facts of this case. Both courts rendered their decisions in this case with difference to that doctrine and to the petitioner's constitutional rights. The respondent believes that they did so correctly and that nothing would be gained from granting the petition in this case.

Furthermore, the respondent cannot help but believe that the principal issue raised by the petitioner here is a false one. The real issue is whether the petitioner in fact was suffering from a mental disease or defect excluding fitness to proceed. In spite of the fact that the petitioner confuses these issues in his argument, the latter one was not presented to the 27.26 hearing court. Nor was any evidence introduced on the issue. The respondent finds it incomprehensible that

the real issue was not raised if there is any merit to the petitioner's false issue as whether the petitioner was in fact incompetent to stand trial does not depend on what doubts the trial court should have had.

Perhaps some explanation is required concerning Exhibit F attached to the petition. That exhibit is a letter from the office of respondent's attorney to the lower court. The respondent's position outlined in that letter was an alternative one advanced to the lower court and not the principal one which is the same as has been presented to this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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